



DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 5

[Docket No. FR-5173-N-03]

**Affirmatively Furthering Fair Housing: Re-opening Public Comment Period
on Subject of Later First AFH Submission Date for Certain Entities**

AGENCY: Office of General Counsel, HUD.

ACTION: Proposed rule; re-opening of comment period for a specific topic.

SUMMARY: On July 19, 2013, HUD published a proposed rule on Affirmatively Furthering Fair Housing. The comment period for the proposed rule closed on September 17, 2013. HUD received over 1,000 public comments in response to the proposed rule. While many commenters expressed outright support for HUD's proposal, and other commenters expressed outright opposition, the majority of the commenters provided valuable feedback and suggestions on HUD's proposal.

One area of concern expressed by many commenters was the ability of program participants, those that are small or those that receive small grants or allocations of HUD funds, to prepare and submit the Assessment of Fair Housing (AFH) in accordance with the process set out in HUD's proposed rule, and by the proposed submission deadline. Commenters comprised of State jurisdictions or their representatives also expressed concern about the ability to complete an AFH, which they commented did not take into consideration the unique role of States. These commenters stated that HUD's proposed AFH was tailored to entitlement jurisdictions.

In response to these comments, HUD is considering providing certain HUD program participants — States, Insular Areas, qualified PHAs, jurisdictions receiving a small Community Development Block (CDBG) grant (which is based on a percentage of the CDBG formula

appropriation, as described in this notice) — with the option of submitting their first AFH at a date later than would otherwise be required for program participants that are not States or Insular Areas, not qualified PHAs, and are not grantees receiving a small CDBG grant, as proposed to be defined in this notice.

This supplemental notice of proposed rulemaking therefore re-opens the public comment period on the Affirmatively Furthering Fair Housing proposed rule for an additional 30 days solely to seek comment on these specific issues. HUD is not soliciting comment on any other issues related to HUD's July 19, 2013, proposed rule.

DATES: The comment period for a specific topic in the proposed rule published on July 19, 2013 (78 FR 43709), is re-opened. The due date for comments discussed in this supplemental notice of proposed rulemaking is **[Insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: Interested persons are invited to submit comments responsive to this request for information to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-7000.

Communications must refer to the above docket number and title and should contain the information specified in the "Request for Comments" of this supplemental notice of proposed rulemaking.

Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> website can be

viewed by interested members of the public. Commenters should follow instructions provided on that site to submit comments electronically.

Submission of Hard Copy Comments. Comments may be submitted by mail or hand delivery. To ensure that the information is fully considered by all of the reviewers, each commenter submitting hard copy comments, by mail or hand delivery, should submit comments or requests to the address above, addressed to the attention of the Regulations Division. Due to security measures at all federal agencies, submission of comments or requests by mail often result in delayed delivery. To ensure timely receipt of comments, HUD recommends that any comments submitted by mail be submitted at least 2 weeks in advance of the public comment deadline. All hard copy comments received by mail or hand delivery are a part of the public record and will be posted to <http://www.regulations.gov> without change.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of this supplemental notice of proposed rulemaking.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Comments. All comments submitted to HUD regarding this supplemental notice of proposed rulemaking will be available, without charge, for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the documents must be scheduled by calling the Regulation Division at 202-708-3055 (this is not a toll-free number). Copies of all comments submitted will also be available for inspection and downloading at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Camille Acevedo, Associate General Counsel for Legislation and Regulations, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10282, Washington, DC 20410; telephone number 202–708–1793 (this is not a toll-free number). Individuals with hearing- or speech- impairments may access this number via TTY by calling the toll-free Federal Relay Service during working hours at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On July 19, 2013, at 78 FR 43709, HUD published in the Federal Register rulemaking that proposed a new fair housing planning process to assist program participants in carrying out their duty to affirmatively further fair housing, a duty required under the authority of the Fair Housing Act (title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601-3619).¹ Section 808(e)(5) of the Fair Housing Act (42 U.S.C. 3608(e)(5)) requires that HUD programs and activities be administered in a manner that affirmatively furthers the policies of the Fair Housing Act. The proposed rule presented a proposed definition of the term “affirmatively furthering fair housing” for purposes of program participants’ planning processes and an approach to fair housing planning that HUD believes would better aid program participants fulfill their statutory obligation to affirmatively further fair housing in accordance with Fair Housing Act requirements.

As noted in the Summary of this supplemental notice of proposed rulemaking, HUD received over 1,000 comments in response to the proposed rule.² While HUD continues to

¹ The July 19, 2013, proposed rule can be found at <http://www.gpo.gov/fdsys/pkg/FR-2013-07-19/pdf/2013-16751.pdf>.

² All public comments on HUD’s July 19, 2013, proposed rule can be found at <http://www.regulations.gov/#!docketDetail;D=HUD-2013-0066>.

review and consider the helpful and thoughtful questions, recommendations, and concerns raised by the public commenters, this document seeks comment on the limited issue of a delayed submission of the first AFH for certain entities.

As more fully discussed below, HUD is considering providing a later submission date for the first AFH to be completed by qualified PHAs, and entitlement jurisdictions that receive small CDBG grants (as defined below), States, and Insular Areas.

In the July 19, 2013, proposed rule, HUD specifically sought public comment on issues pertaining to the subject matter of this document. Question 12 of the proposed rule, at 78 FR 43724, solicited comment on whether there are any AFH requirements that should be modified for States. Question 13 of the proposed rule, at 78 FR 43724, solicited comment on whether there are any AFH requirements that should be modified for small program participants, such as small units of general local government and small public housing agencies (PHAs).

HUD appreciates the comments specifically directed to these issues, and solicits further comment on these issues as modified and elaborated upon in this supplemental notice of proposed rulemaking.

II. Specific Requests for Comment - Later AFH Submission Date for Certain Entities

HUD takes the opportunity in this document to assure all program participants that HUD intends to provide all program participants with sufficient time to prepare and submit their first AFH. HUD agrees with commenters that not all program participants are the same; that they vary in such aspects as size, capacity, the amount of HUD resources generally received annually, the scope of responsibilities under various HUD programs; and any or all of such aspects may factor in their ability to timely respond to new regulatory requirements. To address this concern,

HUD is considering providing the following categories of program participants with a later submission date for their first AFH.

Along with the consideration to provide certain entities additional time to complete their AFHs, as described in this supplemental notice of proposed rulemaking, HUD is considering a staggered AFH submission approach, as recommended by many commenters.

States and Insular Areas: HUD acknowledges the comments stating that the AFH process proposed in the July 19, 2013, rulemaking is better suited for local jurisdictions, and not States and Insular Areas. In the 60-day notice on the AFFH Assessment Tool that HUD published in the Federal Register on September 26, 2014, at 79 FR 57949, in accordance with the Paperwork Reduction Act, HUD advised that the Assessment Tool that is the subject of the 60-day notice is primarily designed for use by entitlement jurisdictions, other than States, and for joint submissions by entitlement jurisdictions and public housing agencies (PHAs). (See 79 FR 57950-57951.)³ The notice also stated that HUD is considering developing program participant-specific Assessment Tools, such as one specifically for States and Insular Areas, and that: “It is HUD’s intention to have any program-participant-specific Assessment Tools developed by HUD available for public comment at the 30-day notice required under the Paperwork Reduction Act.”

Upon further consideration, HUD has decided to design a separate Assessment Tool for States and Insular Areas. HUD believes that a separate Assessment Tool for States and Insular Areas would address commenters’ concerns about the AFH approach being better suited for entitlement jurisdictions. This separate Assessment Tool will not be provided for public comment as part of the 30-day notice for the Assessment Tool presented in the September 26,

³ HUD’s proposed Assessment Tool can be found at <http://www.gpo.gov/fdsys/pkg/FR-2014-09-26/pdf/2014-22956.pdf>, and the public comments can be found at <http://www.regulations.gov/#!docketDetail;D=HUD-2014-0080>.

2014, notice. Rather, HUD will have the Assessment Tool for States and Insular Areas separately undergo the full notice and comment process (a 60-day notice and a 30-day notice) under the Paperwork Reduction Act.

Specific solicitation of comment #1: HUD welcomes public comment on the proposal to delay submission of the first AFH for States and Insular Areas.

Qualified PHAs: HUD is also considering delaying the date of submission of the first AFH for PHAs that meet the criteria of a “qualified PHA,” as defined in section 2702 of title VII of the Housing and Economic Recovery Act (HERA).⁴ Section 2702 of HERA defines “qualified PHA” as a PHA: (1) for which the sum of (i) the number of public housing dwelling units administered by PHA, and (ii) the number of vouchers under section 8(o) of the United States Housing Act of 1937 (42 U.S.C. 1437f(o)) administered by the PHA is 550 or fewer; and (2) that is not designated under section 6(j)(2) of the United States Housing Act as a troubled PHA, and does not have a failing score under the Section 8 Management Assessment Program during the prior 12 months. HUD codified this statutory definition in its regulations on Public Housing Agency Plans at 24 CFR part 903, and the definition of “qualified PHA” is found at § 903.3(c).

HERA defined qualified PHAs to exempt such PHAs, which are small PHAs, from the burden of preparing and submitting an annual PHA Plan. Given that Congress has determined that qualified PHAs should have reduced administrative burdens, HUD believes it is appropriate to provide these agencies with more time to submit their first AFH.

Specific solicitation of comment #2: HUD seeks comment on a delayed submission date of the first AFH due for qualified PHAs.

⁴ Pub. L. 110-289, 122 Stat. 2654, approved July 30, 2008, see 122 Stat 2863.

Entitlement Jurisdictions Receiving Small CDBG Grants (Grants of Approximately \$350,000 or Less): In addition to recognizing the burdens faced by small entities, such as small PHAs, HUD recognizes that the amount of HUD funding that many entitlement jurisdictions receive is not substantial. HUD has discussed the challenges faced by entitlement jurisdictions receiving small CDBG grants in HUD's Congressional Justifications (CJ) provided for Fiscal Years 2014 and 2013.⁵

In the two CJs, HUD discussed that the median CDBG grant size for entitlement communities in FY 2012 was just under \$800,000, but that almost 15 percent of CDBG entitlement grantees received an allocation of less than \$300,000 in 2012. HUD advised that given the very limited amount of money the grantees can use for planning and administrative costs (\$60,000 for a \$300,000 grant), HUD expressed concern about the ability of grantees to effectively sustain their programs with such small dollar-amount grants. In response to such concern and in order to assist entitlement jurisdictions receiving small CDBG grants, in October 4, 2012, HUD hosted a webinar for "Small Grantees (CDBG Grantee < \$350,000 Per Year)." The purpose of the webinar was to invite small CDBG grantees to express their concerns, and to address certain topics posed by HUD.⁶

Although the focus in the CJs and the webinar have been on dollar amounts in the range of \$300,000 to \$350,000, HUD proposes that delineation of which entitlement jurisdictions are defined as those receiving small CDBG grants should be based on a percentage of the CDBG formula appropriation, and HUD proposed such delineation in the FY 2014 CJ. HUD proposed

⁵ See pages P-15 and P-16 for FY 2013 CJ at <http://portal.hud.gov/hudportal/documents/huddoc?id=CommunityDevelopmentFund.pdf>; and page Q24 of the FY 2014 CJ at <http://portal.hud.gov/hudportal/documents/huddoc?id=COMDEVFUND.pdf>.

⁶ See <https://www.hudexchange.info/training-events/courses/moving-cdbg-forward-small-grantees-cdbg-grant--350-000-per-year-webinar/>.

to establish a minimum grant threshold of 0.0125 percent of the CDBG formula appropriation amount in order for a jurisdiction to receive a direct CDBG entitlement allocation. HUD stated that based on the requested funding level of \$2.798 billion in FY 2014, and jurisdictions that received fiscal year 2012 CDBG entitlement allocations, HUD estimated that 239 local governments would fall below the 0.0125 percent minimum grant threshold (\$348,875). The percentage proposed by HUD in the FY 2014 CJ, reaches the same result as a dollar threshold, approximately \$350,000, but is a better measure of a small grant than a strict dollar amount threshold. Accordingly, HUD is proposing that entitlement jurisdictions receiving a grant of 0.0125 of the CDBG formula appropriation or less are designated as small CDBG grantees and, similar to qualified PHAs, HUD would delay the submission date of the first AFFH by small CDBG grantees.

Specific solicitation of comment #3: HUD seeks comment on whether the proposed percentage of 0.0125 of the CDBG formula appropriation is an appropriate threshold to set for entitlement jurisdictions that would be provided a later first AFH submission date. HUD welcomes any alternative thresholds that would better capture those entitlement jurisdictions that have capacity challenges. HUD asks that commenters offering alternative thresholds explain the basis for any alternative threshold suggested.

III. Solicitation of Comment Only on Delayed Submission of First AFH

This solicitation of public comment is solely on the specific questions pertaining to whether there should be a delayed submission date for certain entities as provided in this supplemental notice of proposed rulemaking. This notice is not re-opening public comment on any other issues related to HUD's July 19, 2013, proposed rule, and HUD will not review or

consider public comments that address issues other than the specific questions in this document directed to delayed submission of the first AFH.

Dated: January 9, 2015.

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Legislation and Regulations

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